RIGHTS STUFF

A Publication of The City of Bloomington Human Rights Commission

City of Bloomington

June 2010

Volume 131

National Day Of Prayer Held To Be Unconstitutional

In 1952, the Rev. Billy Graham held a six-week religious campaign in Washington, D.C. On the last day of the campaign, he said, "What a thrilling, glorious day it would be to see to the leaders of our country today kneeling before Almighty God in prayer." He called for the establishment of a National Day of Prayer.

The next day, a member of Congress, Percy Priest, introduced a bill to establish a National Day of Prayer. A supporter said that "the national interest would be much better served if we turn aside for a full day of prayer for spiritual help and guidance from the Almighty during these troublous times. I hope that all denominations, Catholics, Jewish and Protestants, will join us in this day of prayer." Another supporter said the bill would be a measure against "the corrosive forces of communism which seek simultaneously to destroy our democratic way of life and the faith in an Almighty God on which it is based."

The law was passed in 1952 and said that "The President shall set aside and proclaim a suitable day each year, other than a Sunday, as a National Day of Prayer, on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." The bill was amended in 1988, specifying that the president should proclaim the first Thursday in May as the National Day of Prayer. Every year since 1952, every president has issued proclamations designating a National Day of Prayer.

The Freedom from Religion Foundation sued, saying this law violated the U.S. Constitution, and recently, a federal district judge agreed. The judge's decision is 28 pages and covers the long judicial history of the First Amendment. The judge held the following:

- The law endorses prayer, contrary to the First Amendment.
- The law endorses certain kinds of religions, as it mentions God and churches, making no references to mosques or to religious people who don't turn to God in prayer.
- Unlike Christmas or Thanksgiving, the National Day of Prayer has no significant secular meaning.
- The law goes further than merely acknowledging the role of religion and prayer in many Americans' lives, as it encourages people to pray. It could be read as meaning that "If you do not believe in the power of prayer, you are not a true American."
- Although the law does not force anyone to pray, the Court said that "when the power, prestige and financial support of government is placed behind a particular religious belief, the indirect civic pressure upon religious minorities to conform to the prevailing officially approved religion is plain."

The ruling can be found at Freedom From Religion Foundation, Inc. v. President Barack Obama and White House Press Secretary Robert L. Gibbs, 2010 WL 1499451 (W.D. Wis. 2010). ♦

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Deducting Costs Of Sex Reassignment Surgery

The Internal Revenue Code allows taxpayers to deduct from their taxes medical expenses incurred for treatment of diseases. The United States Tax Court recently ruled that the costs of sex reassignment surgery may be deductible.

Rhiannon G. O'Donnabhain was born a male, but she said she was uncomfortable with being a male from childhood. She began wearing girl's clothes privately when she was ten. Once an adult, she became a civil engineer, served in the Coast Guard, married a woman and fathered three children. But she continued to feel she was female, a feeling that intensified after her divorce in 1992.

She sought treatment from a psychotherapist in 1996 and in 1997, she was diagnosed as a transsexual suffering from severe gender identity disorder (GID). According to the Diagnostic and Statistical Manual of Mental Disorders, a GID diagnosis is indicated when the person has a strong and persistent discomfort with his anatomical sex, including a preoccupation with getting rid of primary and secondary sex characteristics, an absence of any physical intersex (hermaphroditic) condition and a clinically significant distress or impairment in social, occupational or other important areas of functioning as a result of the discomfort arising from the perceived incongruence between his anatomical sex and his perceived gender identity.

Ms. O'Donnabhain began treatment that would result in her sex reassignment, including hormones and surgery. In 2001, she incurred and paid for $21,741 in medical expenses for surgery, hormone therapy, travel costs, medical equipment and counseling. These expenses were not covered by her insurance, so on her 2001 tax return, she claimed an itemized deduction for these expenses. The IRS disallowed these deductions, but she sued, and the Tax Court largely overruled the IRS.

Her expert witness said that such surgery and related treatment are often necessary to treat GID. He said that "autocastration, autopenectomy and suicide have been reported in patients who did not receive appropriate treatment for their GID."

The IRS's expert witness said that the validity of the GID diagnosis remains the subject of debate within the medical community. But he himself had diagnosed patients with GID. He said the procedures are "elective and not medically necessary," but acknowledged that some doctors disagreed with him. He said that only treatment for diseases or illnesses that have been shown to arise from a pathological process within the body should be tax deductible, but he provided no support for this argument.

The Court disallowed Ms. O'Donnabhain's expenses for breast augmentation, saying the record was not clear whether her hormone treatments had given her feminine breasts and so it was not clear that this expense was medically necessary. The case is O'Donnabhain v. Commission of Internal Revenue, 134 T.C. No. 4, 2010 WL 3642006 (U.S. Tax Court 2010). ♦

Guide Dog Banned From Diner Because Owner Thought It Was Gay

In May, 2009, Ian Jolly tried to go into a restaurant called Thai Spice in Australia. A restaurant employee mistook his guide dog, Nudge, for a "gay dog" and would not allow him to enter.

At a hearing, the owners said that one of the waiters thought that Mr. Jolly's partner said they wanted "to bring a gay dog into the restaurant." The waiter refused the couple and Nudge entry, even though the restaurant had a sign saying "guide dogs welcome," and even though the couple provided them with a card with facts about guide dogs. According to news reports, the "staff genuinely believed that Nudge was an ordinary pet dog which had been desexed to become a gay dog."

Mr. Jolly filed a complaint with the region's Equal Opportunity Tribunal. After a conciliation hearing, the restaurant agreed to pay him $1500, to give him a written apology and to require staff to attend an equal opportunity education course.

Mr. Jolly said he was happy with the result, but the embarrassing incident had dampened his enthusiasm for eating out at restaurants. He said, "It gives you some comfort that Equal Opportunity is there, but I always have that fear now, when I go out. I just want to be like everybody else and be able to go out for dinner, to be left alone and just enjoy a meal." ♦

Verizon Sued For Race Discrimination

Ronald Jackson is an African American man who began working for Verizon as a retail representative at Verizon's kiosk in Lafayette Square Mall in February of 2005. Three years later, this kiosk closed, and he moved to the Verizon's Centre West store.

Before Jackson transferred to the Centre West store, he applied for a retail sales representative job at Verizon's Castleton location. Eight other Verizon employees applied for this opening. He met the minimum qualifications and so received an interview, but not a job offer.

Evidence showed that Ted Wendling, the district manager of retail sales in Indianapolis, said that he didn't think that Jackson would be a good fit for this location before he even met Jackson. Wendling and Elizabeth Hill, the Castleton store manager, interviewed Jackson. Hill initially rated Jackson a four out of five on interview rating, but after she talked to Wendling, she lowered that to three out of five. Hill said that her top choice for the position was another African American male applicant, but Wendling said they needed to hire a white applicant because "[o]ur ratio in our store [had become] too dark so we needed to hire a white person."

Jackson also provided evidence that a store manager for Verizon in Carmel said that he could not hire any more African Americans because he had been told to keep the store "balanced." Hill testified that the Carmel manager had told her that he had "too many black people" at his store.

When Jackson sued, alleging he didn't get the transfer because of race discrimination, Verizon moved for summary judgment. This means it thought it should win the case without having to proceed to trial because the plaintiff clearly will not be able to establish the legal requirements necessary to prevail. Verizon lost its motion.

The Court said there was sufficient evidence to show that the selection process might have been tainted by race discrimination, and said the case should proceed to trial.

The case is Jackson v. Verizon Wireless, 2009 WL 3617739 (S.D. Ind.). ♦

Manual Duties Part Of An Assistant Manager's Job

Katherine Richardson was the assistant manager at a small restaurant in Maine. Her job duties included administrative tasks and also manual tasks such as cooking and cleaning. When shoulder pain made it hard for her to grill and to scoop ice cream, she modified her duties, using tongs to move food and assigning some tasks to other employees.

When she needed surgery for her shoulder, she took time off under the Family and Medical Leave Act. After she had exhausted her leave, she was still not healed enough to resume all of her duties, so she was fired. She sued under the ADA.

Richardson claimed that she could do what she called the "sole essential function" of her job, overseeing the operation of the restaurant. But the restaurant provided a copy of her job description, which listed her essential duties as assisting the general manager in administrative and operational duties, providing guidance to personnel, overseeing, directing and assisting in the kitchen and facilitating production and customer service. The Court said that based on the job description, it was clear that the assistant manager had to be able to perform a broad range of manual tasks.

The Court said that if the restaurant had been a larger business, with a larger staff, manual tasks might not be essential duties of an assistant manager. But in this case, even Richardson herself testified that it was often necessary for her to help out with cooking, cleaning, serving food and unloading. She said these repetitive tasks caused her injury.

Richardson tried to argue that before she went on leave, other employees helped out with these tasks, which proved they were "non-essential." But the Court said that "An employer does not concede that a job function is 'non-essential' simply by voluntarily assuming the limited burden associated with a temporary accommodation."

One moral of this case is clear: make sure you have well-written job descriptions that accurately list essential functions of each job. Courts will give such descriptions a considerable amount of deference. The case is Richardson v. Friendly Ice Cream Corporation, No-08-2423 (1st Cir. 2010). ♦

Service Dogs Help With Post Traumatic Stress Disorder

According to the New York Times, a growing number of returning veterans are using psychiatric service dogs to help them re-integrate into life in the States.

One veteran said that because of his dog, he was able to cut in half the doses of anxiety and sleep medications he took for post-traumatic stress disorders. The night terrors and suicidal thoughts that had kept him awake for days on end ceased. Another veteran said he was able to stop taking his medications completely once he had a dog, and he was able to set foot in a grocery store for the first time in three years.

The federal government is spending several million dollars to study whether scientific research supports these types of anecdotal reports that dogs might speed recovery from the psychological wounds of the battlefield. Senator Al Franken sponsored a bill that created a pilot program so that veterans with PTSD will get trained service dogs. For years, Veterans Affairs has provided service dogs to veterans with physical disabilities, but providing them for veterans with emotional trauma is something new for the agency.

The dogs may be trained to jolt a soldier from a flashback, dial 911 on a phone and sense a panic attack before it starts. One veteran has a dog named Mya. If he tells Mya "block," Mya will stand perpendicularly in front of him to keep other people at a distance. If he tells Mya to "get my back," Mya will sit facing backward by his side.

(Article based on "Service Dogs Help Ease Veterans' Postwar Pain," by Janie Lorber, New York Times, April 4, 2010, page 19.) ♦

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